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No. 08-1057

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In The Supreme Court of the United States

IN RE NAVY CHAPLAINCY;

CHAPLAINCY OF FULL GOSPEL CURCHES, ET AL.,
Petitioners,

v.

UNITED STATES NAVY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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BASIS FOR PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners submit this brief pursuant to with Sup. Ct. R. 15.8, addressing the importance and application of *Pleasant Grove City, Utah, v. Summum*, 555 U.S. __, 129 S.Ct. 1125 (2009) to Petitioners' Petition for Certiorari (the "Petition") in Docket No. 08-1057. Petitioners filed their Petition February 13, 2009, which was docketed on February 19, 2009. On February 25, 2009, the Court issued *Summum*. *Summum*'s analysis and holdings have direct application to the issue Petitioners present to the Court and further show the clear error of the Court of Appeals.

I. *SUMMUM* HAS DIRECT APPLICATION TO THIS PETITION.

Summum has direct application to this Petition because it establishes new precedent which, as applied to the instant case, shows the Court of Appeals' majority opinion is clearly wrong. *Summum* identifies and defines government decisions underlying challenged actions as "government speech." "In sum, we hold that *the City's decision* to accept certain privately donated monuments and rejecting respondent's is best reviewed as *a form of government speech*." *Summum*, 129 S.Ct. at 1138 (emphasis added). In other words, the *government's decision is itself government speech*. *Summum* held that the focus is on the government's *decision* when examining messages communicated by actions challenged under the First Amendment. This is the Court's first linkage of a government's decision and

the resulting governmental action communicating a governmental message, establishing a legal unity between decision and action, with each now defined as "government speech" and subject to judicial review. *Id.*

Summum reaffirmed that "government speech must comport with the Establishment Clause," *id.* at 1132, which also means the decision "must comport with the Establishment Clause." That is the issue in this case. In the Establishment Clause context, this Court and the Courts of Appeals have focused their analysis on the message the government's challenged action communicates to the "objective observer." *See, e.g., McCreary County v. ACLU of KY*, 545 U.S. 844, 862-66 (2005) (describing the "objective observer"). Integral to the objective observer's analysis of the message is the purpose of the government's challenged action, *id.* at 860- 62; 862 (in some cases, "the government action itself bespoke the purpose"), which indirectly presupposes or assumes the challenged action's resulting message was the result of the government's decision-making process. *See id.* at 870- 872 (describing the County's history of decisions addressing the Ten Commandments display). As discussed below, *Summum* correctly links the government's decision that produced the challenged action with the challenged action, showing that there is a unity and inseparability between decision and result because they both are government speech.

In the case at bar, the Court of Appeals held the Navy's illegal appointment and illegal retention of Catholic clergy as chaplains on active duty until they

acquired 20 years time in service to qualify for a pension did not communicate an unconstitutional message of prejudice to Petitioners and therefore produced no harm. A-16. It came to this conclusion despite the fact the Navy's illegal clergy appointment and retention program existed only for over-age Catholics, a clear and undisputed denominational gerrymander. *See* A- 33 ("government action that draws a line around a religious denomination in a community can send a symbolic message of preference that needs no words just as easily as the government's direct presentation of a religious symbol.") (Rogers, J., dissenting). Each of the Navy's illegal actions, *i.e.,* illegal appointment, retention and transfer to and recall from the Retired Reserve, resulted from the Navy's conscious decisions to (1) violate the law and (2) prefer Catholic clergy. Under *Summum*, this is government speech which, by its very nature, has a message with a purpose and context. Courts must review the speech, context and the audience to address constitutional challenges such as Petitioners'.

Petitioners argue that this Court's religious display and prayer cases hold a government's Establishment Clause violation sends dual unconstitutional messages--preference to those in the preferred religion and prejudice and hostility to those not preferred. *See* Petition, 14-19 (citing Supreme Court cases), 33-36 (citing 10 Circuit Court precedents). The Navy's messages originate in and are focused at the Chaplain Corps and its members including Petitioners, and communicate the Navy's preferences with respect to clergy and chaplains. Yet, the Court of Appeals found "significant differences

between Petitioners' case and the religious display and prayer cases":

> In the religious display and prayer cases, the Government was actively and directly communicating a religious message through religious words or religious symbols-in other words, it was engaging in religious speech that was observed, read, or heard by the plaintiffs in those cases. Here, by contrast, *the Navy is not communicating a religious message* through religious words or religious symbols.

A-15-16 (emphasis added). Thus, the Court of Appeals determined that the Respondents' decisions and actions in illegally appointing and retaining over-age Catholic clergy communicate no messages at all. This is in direct conflict with *Summum*'s analysis, logic and holding. *Summum* held that government decisions producing the actions Petitioners challenge are *government speech* and that speech, *i.e.*, the message, "must comport with the Establishment Clause." 129 S.Ct. at 1132.

II. *SUMMUM* ESTABLISHED THE GOVERNMENT'S DECISION AS THE PROPER FOCUS FOR FIRST AMENDMENT ANALYSIS.

At first glance, *Summum* may appear to be *sui generis*, addressing only the unique status of monuments as vehicles of government communication. However, *Summum*'s underlying

analysis, logic and precedent show that it addresses the nature of government decisions as government speech that communicate a message subject to First Amendment constraints.

The question *Summum* addressed was whether Pleasant Grove City's *decision* to reject a private religious monument for display in the City's public park violated the First Amendment. "In 2005, respondent filed this action against the City and various local officials (petitioners), asserting, among other claims, that petitioners had violated the Free Speech Clause of the First Amendment by accepting the Ten Commandments monument but rejecting the proposed Seven Aphorisms monument." *Id.* at 1130.

Unlike other Ten Commandment cases, the constitutionality of the City's previously accepted Ten Commandment display was not at issue. Rather, the gravamen of the case was the City's refusal, *i.e.*, a decision *not* to accept, the *Summum* Respondent's display. The Tenth Circuit held the City "was required to accept the monument because a public park is a traditional public forum." *Id.* This Court reversed, finding the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to strict scrutiny under the Free Speech Clause. *Id.* at 1132-33. Although the Court distinguished between transitory speech associated with public forums and permanent speech reflected in a monument, *id.* at 1137, the Court's analysis examined the City's decision process as the appropriate focus to (1) determine the proper First Amendment standard of

review and (2) evaluate what the City communicated through and as a result of that decision.

The context of the case forced the Court to examine the nature of the City's decision, the means through which government exercised its power. The constitutionality of the City's rejection of the offered monument, *i.e.*, its decision to reject, was the issue before the Court. "No prior decision of this Court has addressed the application of the Free Speech Clause to a government entity's acceptance of privately donated, permanent monuments for installation in a public park, and the parties disagree sharply about the line of precedents that governs this situation." *Id.* at 1131. Implicit in the Court's application of Free Speech precedent is that it was addressing the message communicated by both acceptance and rejection of what are clearly religious displays, each the result of government decision-making. The Court's analysis of why governments accept or reject monuments shows decisions are made based on government-derived criteria, resulting in a message to the public consistent with government's objective.

> Government decision makers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, *are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.*

Id. at 1134 (emphasis added); *see also id.* at 1139 ("Nor is it likely ... that the government will be able to avoid political accountability for the views that it endorses or expresses") (Stevens, J., concurring).

Summum also found the monument selection process was the means by which the City "effectively controlled" the monument's message. *Id.* at 1134 (citing *Johanns v. Livestock Marketing Association*, 544 U.S. 550, 560-61 (2005)). Because placing a monument, whether publicly or privately financed, is "expressive conduct", *id.* at 1136, *Summum* found the City's decision to rejectt an offered monument was itself speech. The decision was as much "expressive conduct" as the monument itself. In *McCreary County*, the Court focused on the display which the County had decided to exhibit, 545 U.S. at 869-72. The Court had no display to evaluate in *Summum* and had to focus on the City's decision which communicated the City's intent and will as government speech. "[W]e hold that the City's decision to accept certain privately donated monuments while rejecting respondent's is best viewed as a form of government speech." *Summum*, 129 S. Ct. at 1138.

III. THE COURT OF APPEALS' DECISION IN THIS CASE IS CONTRARY TO *SUMMUM*'S HOLDING AND LOGIC.

A. Analysis of Respondents' Decisions Under *Summum* Shows They Intended To Communicate a Harm Producing Message of Prejudice to Petitioners.

Petitioners argued below that the challenged Navy program had three distinct parts: illegal appointment of Catholic clergy beyond the legal age limits, illegal continuation of Catholic clergy beyond statutory age limits, and (for some) illegal transfer to the Retired Reserve with an illegal recall to active duty. Petition at 8. Each of these components requires a decision by a Navy decision-maker. That decision was and is intended to affect the Navy Chaplain Corps of which Petitioners are members. The result of these decisions is a denominational gerrymander or preference; the Navy restricted to Catholics its special three-part program guaranteeing a pension in violation of Title 10 and the Constitution. Under *Summum*, each Navy decision at each of the programs' three component parts is government speech communicating not only the Navy's arrogant defiance of the law, but it's preference for Catholics over the Petitioners.

Respondents cannot deny the decisions underlying their challenged actions were and are directed at members of the Navy Chaplain Corps, including Petitioners. The precedent of this Court and ten other Circuits establish that such an unconstitutional message produces injury. *See, e.g. County of Allegheny v. ACLU,* 492 U.S. 573, 595 (1989) ("Endorsement sends a message to non-adherents that they are outsiders, and an accompanying message to adherents that they are insiders, favored members of the political community."); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 302 (D.C. Cir. 2006) (same)). *See also* Petition at 14-38 (citing cases). Petitioners

are the intended targets of the Navy's message of disfavor, Catholics are the intended targets of its preference. "Respondents' willingness to break their own regulations to illegally appoint ineligible, over age Catholic priests as chaplains and further break the law to enable them to attain a pension is an overt act communicating clear messages of denominational favoritism and prejudice." *Id.* at 18. The ruling in *Summum* contradicts the Court of Appeals' holding that the Navy communicated *no* message at all from which the Petitioners suffered harm. A-15-16.

Summum also is relevant to this Petition because the favored chaplains are in effect "monuments" to the Navy's religious prejudice and preference. *Summum* noted that "monuments, [as opposed to transitory speakers or visitors in a park] endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space." 129 S.Ct. at 1137. Similarly, the illegally appointed and retained chaplains take up promotion spaces that would otherwise be available. Petition at 32 (citing Petitioners' harm from reduction of promotion opportunity recognized by *Chaplaincy,* 454 F.3d at 297). There is nothing transitory about the challenged chaplains. For example, LT Steed was illegally assessed at age 57 and illegally retained on active duty for 17 years, Petition at 8. They come in daily contact with Petitioners and their class, as exemplified by Petitioner Stewart's duty assignment to work with LCDR Erestain at Bethesda Naval Medical Center. *Id.* Under *Summum*'s analysis, both the Navy's decision and the illegally appointed chaplains themselves convey forbidden messages of favoritism and prejudice in violation of the

Establishment Clause, thereby harming Petitioners and establishing their standing to challenge the illegal practice.

B. Application of *Summum* Does Not Expand This Court's Standing Precedent.

Analysis under *Summum* of the Navy's decisions allowing the establishment of Respondents' three part illegal program clearly shows the Court of Appeals majority's concern about Petitioners wedging wide the court house doors, A-16, is illogical and unfounded. The challenged actions are the result of Navy decisions affecting its Chaplain Corps, a small community of clergy. The average citizen has no knowledge of how the Chaplain Corps works. An ordinary citizen meeting LCDR Erestain would have no clue he was a symbol of the Navy's preference for Catholics and disdain for non-liturgical clergy such as Petitioner Stewart. Petitioners' knowledge of how the Chaplain Corps works and their interaction with Navy chaplains give them a clear picture that LCDR Erestain and others like him are the result of the Navy's decisions to illegally appoint and retain over-age Catholic clergy until they illegally qualify for a pension.

Because Petitioners know the system, the Navy decisions communicate a clear message of second-class citizenship to Petitioners and favoritism for Catholics. Petitioner Stewart's Complaint (*Gibson v. U.S. Navy*) ¶ 54.b identifies the challenged practice as one of many which show the Navy "has impermissibly endorsed Catholic and Liturgical Protestant as

preferred religious traditions in violation of ... the Establishment Clause." *Id.* at ¶ 55. Stewart and the Petitioners actually see, experience and rub shoulders with the practical results of the Navy's challenged decisions and practices—the living messages of the preference for Catholics and second-class citizenship of the Petitioners. This exposure to and injury from the Navy's decisions is unique to the Petitioners and is not experienced by the average citizen.

Summum examines the government speech reflected in those decisions says in their context and whether it comports with the Establishment Clause. Respondents cannot deny the challenged program was designed for Catholic clergy and operates only for the Chaplain Corps. The Navy's preference for Catholic clergy, to the point that the Navy will violate the law and Constitution, shows it is not religiously neutral but has favorites. The Navy's decisions communicate unconstitutional favoritism and second-class citizenship to Petitioners. *Summum*'s analysis shows Respondents' "government speech", communicated by the decisions establishing the challenged program, was designed to and does harm Petitioners. Respondents' decisions took place in and were designed to affect the Chaplain Corps and communicate Respondents' preferences and prejudices based upon its members' denominations.

The context of Respondents' decisions and actions, the community of Navy chaplains, distinguishes this case from *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), relied on by the Court of Appeals, A-16. *Valley Forge* found the plaintiffs

had no injury because they had no connection with the community where the challenged action occurred and read about it in the newspaper. Petitioners are members of the small community in which Respondents' decisions were made and to which their resulting actions are addressed. Petitioner Stewart did not read about LCDR Erestain in the newspaper, he shook his hand and worked with him, an exposure to the Navy's messages at the most personal level. "Appellants' charge is based on an injury distinct to their status within the Chaplain Corps, [citations omitted], and 'like *[School District of Abington Twp. v]. Schempp*, 374 U.S. 203, 224 n. 9 [(1962)], *Valley Forge* recognized that direct contact with an unwelcome religious experience or display works a personal injury distinct from and in addition to each citizen's general grievance against unconstitutional government conduct.'" A-27-28 (Rogers, J., dissenting) (quoting *Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997)). *See also* Petition at 34-35 (listing 10 Circuit Court decisions holding direct exposure to Establishment Clause violation provides injury and standing). *Summum* shows the Court of Appeals was in error.

CONCLUSION

The Court of Appeals' decision is in conflict with *Summum*'s logic, analysis, and holding. Petitioners respectfully request the Court to grant their request for a writ of certiorari to review and realign the challenged decision with this Court's precedent and that of the other Courts of Appeals.

Respectfully submitted,

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